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No. 98-129

In The

Supreme Court of the United States

October Term, 1997

CICELY ANN PROCOPIO,

Petitioner,

vs.

UNIVERSITY SCHOOL OF NOVA SOUTHEASTERN UNIVERSITY, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner's application for Writ of Certiorari sets forth more than five pages of "facts" in this matter. However, in those pages are both fact and argument with which Respondent does not agree wholeheartedly. Thus, for this Court to properly evaluate the merits of the petition, the following factual clarifications must be set forth.

Petitioner was enrolled as a student in the University School division of Nova Southeastern University, a private secondary school in Broward County, Florida. During the 1996-97 school year, Petitioner was accused of academic dishonesty — a violation of the School's code of conduct.

During the investigation, a five-person Investigation Board found that, in addition to obtaining a stolen math test, Petitioner lied to the Board regarding her involvement in the incidents. Petitioner's academic dishonesty, coupled with her lack of candor and veracity to the board, resulted in her expulsion from the school.

Procedurally, Petitioner instituted this action against the University School of Nova and six employees on January 21, 1997, alleging conspiracy, discrimination and various state and federal statutory violations. The Southern District of Florida dismissed Petitioner's Second Amended Complaint with prejudice as to the federal claims. Thereafter, the trial court refused to exercise jurisdiction over the remaining state claims. As such, Petitioner's state claims were dismissed *without* prejudice.

Petitioner appealed the decision of the trial court to the Eleventh Circuit Court of Appeals. The Eleventh Circuit, after reviewing the record from the court below, affirmed the

dismissal. Thereafter, Petitioner filed this Petition for Writ of Certiorari with the United States Supreme Court.

REASONS FOR DENYING THE WRIT

The Petition in the instant case seeks review of an Eleventh Circuit opinion affirming the Southern District of Florida's dismissal of this action. The Petition set forth the following Question Presented: "[w]as Appellant denied due process when the Trial Court entered summary judgment absent a hearing on the merits?" Petitioner set forth this legal question in error, as the case at bar never advanced beyond the pleading stage in the trial court. NSU obtained a **dismissal** of Petitioner's case, and the trial court neither entertained nor granted a Motion for Summary Judgment.

As detailed below, there is no cause for this Court to review the factbound contentions and previously settled legal arguments of the Petitioner. Petitioner sets forth countless factual issues which should not be subject to review by this Court. Further, Petitioner fails to establish or even assert any sound legal grounds for reversal of the Eleventh Circuit. As demonstrated herein, Petitioner's arguments, even if regarded with wide latitude, do not give rise to review by this tribunal.

I.

PETITIONER FAILS TO SET FORTH ANY GROUNDS TO JUSTIFY REVIEW BY THIS COURT.

As an initial matter, Petitioner has failed to set forth any grounds to justify review by this Court and, in fact, this type of case is not typically reviewed by the United States Supreme Court. The United States Supreme Court sets forth the factors the Court will consider when deciding whether to grant review.

While not exhaustive, the Court sets forth the following list of factors:

> The Supreme Court will grant review if:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court, Rule 10.

In the instant case, the Petitioner does not fall into any of the categories enumerated in the Rules of this Court. *See Id.* Petitioner does not and cannot point to any conflict among the court of appeals, and thus review under this portion of Rule 10(a) is blatantly inapplicable. *See* Supreme Court, Rule 10(a). Similarly, there is no allegation of conflict between federal law

and a state court of last resort, also precluding review under Rule 10(a). *See id.* Moreover, Petitioner does not allege that a state court of last resort conflicts with another state court of last resort, which further precludes review under Rule 10(a). Finally, Petitioner has not pointed to any important question of federal law decided by the Eleventh Circuit in the instant case. In fact, the Eleventh Circuit merely issued a one sentence, per curiam opinion affirming the trial court, and thus, review of this case under the final clause of Rule 10(a) is also inappropriate. As none of these factors exist, the Petition cannot justifiably be reviewed by this Court under this rule.

Petitioner attempts to allege a departure from the usual course of judicial proceedings in her accusations that the lower courts abused their discretion in granting and/or affirming the dismissal of Petitioner's Second Amended Complaint, a fact which could conceivably establish grounds for review under the final clause of Rule 10(a). *See id.* However, the conduct of both the trial court and the Eleventh Circuit clearly conforms to judicial protocol and established procedural standards. Therefore, review is not appropriate under this portion of Rule 10.

The Federal Rules of Civil Procedure clearly delineate the grounds for dismissal of an action. Fed. R. Civ. P. 12(b)(6); *See also Brown v. Budget Rent-A-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997). It is within the judge's power to dismiss an action upon proper grounds. Should a litigant take issue with the trial court's ruling, the proper remedy is an appeal to the Eleventh Circuit. Fed. R. App. P. 4.

The Eleventh Circuit has jurisdiction to evaluate the conduct of the trial court judge and to either affirm the court's ruling or express disagreement in the form of reversal. *Id.* In the instant case, Petitioner appealed her case to the Eleventh

Circuit. The Eleventh Circuit reviewed the briefs and the record *below and, based upon same, affirmed the District Court's ruling* in a per curiam opinion.

While Petitioner attempts to allege a departure from the usual course of judicial proceedings, Petitioner fails to demonstrate any abuse of discretion in the lower tribunals. Each Court acted within established procedural parameters and each Court found that Petitioner could not state a cause of action, even if the facts alleged were taken as true. As such, there is no departure from the accepted or usual course of judicial proceedings. Accordingly there is no basis to precipitate review under the final clause of Rule 10(a). *See* Supreme Court, Rule 10(a).

Additionally, Petitioner fails to set forth any important federal question decided by either a state court or Court of Appeals that has not been, but should be, decided by the Supreme Court. To the contrary, Petitioner relies *almost entirely* on law established by the United States Supreme Court and argues that this well-established law was applied incorrectly by the lower courts. The Supreme Court, however, rarely grants review "**when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law**." Supreme Court, Rule 10 (*Emphasis added*).

Indeed, the Court will ordinarily deny review of judgments based solely on questions of fact. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 84 L. Ed 704, 60 S. Ct. 611 (1940). Despite this, Petitioner bombards this Court with "facts" and goes to great lengths to convince this Court that the facts were not evaluated properly. This is insufficient to warrant review of this matter.

Additionally, absent extraordinary circumstances, the Supreme Court will not grant review for the alleged

misapplication of a properly stated rule of law. Nonetheless, Petitioner alleges that the trial court erred in determining that she did not allege a cause of action under section 1985 because she failed to allege that the actions against her were based on her membership in a protected class, as required. *See* Petition for Writ of Certiorari at pp. 7-8. Courts have delineated what constitutes a class for the purposes of Section 1985. *See Lake v. Arnold*, 112 F.3d 682 (3d Cir. 1997) (holding that "a private conspiracy action is predicated on 'some racial, or perhaps otherwise, class based, invidiously discriminatory animus,' " and citing sex, race, and national origin as examples). This law is well established. Nevertheless, Petitioner now seeks to have this Court review the manner in which the trial court applied the law in the case at bar. The trial court appropriately found that Petitioner failed to allege that her membership in a protected class led to her expulsion. The Eleventh Circuit agreed. Thus, Petitioner's current allegation of misapplication of the law does not warrant review by this Court.

Petitioner further asserts that the trial court misapplied the law governing dismissal of actions. *See* Petition for Writ of Certiorari at p. 8. The law is well established that an action may be dismissed if the facts, taken as true, fail to establish a cause of action upon which relief may be granted. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). Petitioner questions the lower courts' determination that her pleadings lacked substantive sufficiency. This, however is another example of the Petitioner questioning the manner in which the courts below applied the law, and does not involve the establishment of new law. As such, this assertion does not justify review by this Court.

Ultimately, Petitioner failed to set forth any of the enumerated bases upon which to grant review. Further, it is longstanding policy that the jurisdiction of the Supreme Court

over Court of Appeals' decisions **is to be used sparingly and only in cases of extreme gravity or to ensure uniformity among the Circuits.** *See Re Lau Ow Bew*, 141 U.S. 583, 35 L. Ed 868, 12 S. Ct. 43 (1891); *Fields v. United States*, 205 U.S. 292, 51 L. Ed 807, 27 S. Ct. 543 (1907). This is neither a case of extreme gravity, nor is it a case to rectify lack of uniformity among the Circuits. As such, Petitioner cannot establish sufficient grounds to predicate review, and thus, this Court should reject the instant Petition.

II.

PETITIONER FAILS TO ESTABLISH OR EVEN ASSERT ANY LEGAL GROUNDS FOR REVERSAL OF THE ELEVENTH CIRCUIT.

In addition to insufficient grounds to predicate review, Petitioner bases her Petition on inaccurate legal theories, and has failed to supply this Court with legal grounds upon which a reversal could be based. These additional shortcomings further establish that review of this case is improper.

A. The Eleventh Circuit Correctly Held that the Petitioner Failed to State a Claim Under 42 U.S.C. § 1985(3).

As the first argument in her Petition, Petitioner claims that the trial court and Eleventh Circuit erred in holding that she failed to state a cause of action under 42 U.S.C. § 1985(3). In pleading a section 1985 claim, one must allege: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protections of the laws, or of equal privileges and immunities under the laws; and, (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of

any right or privilege of a citizen of the United States. *Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1146-47 (11th Cir. 1996). The trial court determined that Petitioner failed to allege that Respondents' actions against her were in any way motivated by Petitioner's membership in a protected class. *See* Final Order dated Feb. 8, 1997, p. 4, attached to Petition for Writ of Certiorari as Appendix "B". It was this fact that led the trial court to appropriately dismiss the federal counts of Petitioner's Complaint.

B. Petitioner Wrongfully Asserts that the Eleventh Circuit Abused its Discretion by Requiring Petitioner to Meet the Same Substantive Pleading Standards as an Attorney.

Petitioner correctly asserts that "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *See* Petition for Writ of Certiorari at p. 9, *citing United States v. White County Bridge Commission*, 275 F.2d 529 (7th Cir. 1950). Additionally, Petitioner correctly asserts that a complaint can only be dismissed for failure to state a claim if the plaintiff cannot prove facts that would entitle her to relief. *Id.* In the instant matter, however, Petitioner (a pro se plaintiff) was treated leniently by the Court and her pleadings were not held to the same stringent standards applied to non-pro se pleadings. Nevertheless, this leniency does not guarantee that her causes of action should be maintained. In fact, pro se litigants, while given latitude regarding the technical requirements of pleadings, must still establish the substantive sufficiency of their pleadings. As several courts have held,

> Courts do and should show a leniency to pro se litigants not enjoyed by those with the benefit of a legal education. Yet even in the case of pro se litigants **this leniency does not give a court license to serve as de**

facto counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action.

GJR Investments, Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1369 (11th Cir. 1998) (*Emphasis added*, citations omitted); *see also Nicastro v. Clinton*, 882 F. Supp. 1128 (D.C. D.C. 1995) (holding that a pro se plaintiff, although held to a less stringent standard, must still present a claim upon which relief may be granted). **Accordingly, a district court is not required to manufacture facts or allegations that are not pled, even if the plaintiff is pro se.** *See Abdool-Rashaad v. Seiter*, 690 F. Supp. 598 (S.D. Ohio 1987). Further, a court "cannot rewrite an inadequate complaint to plead essential allegations in order to sustain an action. This is true even in cases involving pro se litigants." *See Pontier v. City of Clearwater, Fla.*, 881 F. Supp. 1565, 1568 (M.D. Fla. 1995). Thus, while a court will liberally construe the pleadings of a pro se litigant, this does not alleviate the plaintiff's burden of demonstrating "sufficient facts to state a legally cognizable claim." *See White v. State of Colorado*, 82 F.3d 364 (10th Cir. 1996).

In the present case, the trial court evaluated Petitioner's pleadings and allowed Petitioner opportunities to amend. *See* Final Order of Dismissal attached to Petition for Writ of Certiorari as Appendix "B." The trial court, upon evaluating the Second Amended Complaint, determined that Petitioner failed to plead facts that would entitle her to relief. *Id.* The trial court, not being obligated to "fill in the blanks" for Petitioner, determined that Petitioner failed to state a claim upon which relief could be granted. *Id.* Accordingly, the dismissal of the Complaint did not violate the leniency requirement for treatment of pro se litigants.

The legal principle that pro se litigants are to be granted leniency generally absolves a pro se plaintiff from the technical

pleading requirements and from pleading appropriate damages. *See Irizarry v. Palm Springs General Hosp.*, 657 F. Supp 739 (S.D. Fla. 1986), *see also Tuma v. Dade County Public Schools*, 1998 WL 15637 (S.D. Fla. 1998) (applying the liberal standard to correcting the title of plaintiff's pleading). Petitioner was afforded leniency regarding the technical sufficiency of her pleadings. However, as stated above, the leniency benefit does not eliminate the requirement that the plaintiff establish some cause of action upon which relief may be granted. As Petitioner did not establish a cause of action upon which relief may be granted, dismissal was proper.

Petitioner also asserts that the Eleventh Circuit abused its discretion by affirming dismissal of the instant action. In evaluating the dismissal of an action by the trial court, the Circuit Court will review the case *de novo*. *See Harper v. Blockbuster Entertainment Corp.*, 1998 WL 207893 (11th Cir. 1998). In fact, the standard of review for a motion to dismiss is the same for the appellate court as it is for the trial court. *Id.*, *citing Stephens v. H.H.S.*, 901 F.2d 1571, 1573 (11th Cir. 1990). Thus, the Eleventh Circuit Court of Appeals was required to review the case to determine if Petitioner's pleadings, taking all the allegations as true[1], could establish a cognizable cause of action. Accordingly, the Eleventh Circuit reviewed Judge Zloch's Dismissal of Petitioner's action to determine whether the facts, taken as true, could establish *any* cause of action. Finding that the Petitioner could not establish any cause of action based on the facts provided, the Eleventh Circuit affirmed the District Court's dismissal.

Petitioner incorrectly asserts that the conduct of the Circuit Court constitutes abuse of discretion. To the contrary,

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1. For purposes of a motion to dismiss, the allegations in the complaint must be taken as true. *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990).

> "Abuse of discretion" occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.

In re Hillsborough Holdings Corp., 127 F.3d 1398, 1401 (11th Cir. 1997). The Eleventh Circuit did not fail to apply a proper legal standard, nor did it base its decision on findings of fact that are clearly erroneous. The Circuit Court opinion, while concise, indicates that it reviewed the record below and agreed that, taking the alleged facts as true, Petitioner failed to state a cognizable cause of action. The Circuit Court thus saw no legal cause to overturn the District Court. The court therefore acted appropriately and without any abuse of discretion.

C. Petitioner Wrongfully Asserts that the District Court Erred by Not Allowing the Case to "Fully Develop."

As her next argument, Petitioner faults the lower courts with not permitting a case initiated by a pro se litigant to "fully develop." With this assertion, Petitioner seems to imply that she is **entitled** to a trial in this cause based on her status as a pro se litigant. As other courts have stated, however,

> [w]hile courts must apply "less stringent standards" in determining whether pro se pleadings state a claim for which relief can be granted, **pro se plaintiffs are not automatically entitled to take every case to trial.** As this Court has noted, the lenient treatment generally accorded to pro se litigants has limits.

See Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996) (*Emphasis added*). A motion to dismiss should be granted when the plaintiff cannot prove any set of facts that would entitle her

to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). As such, a pro se litigant is not guaranteed a trial if the facts set forth in the complaint do not entitle her to relief. In the instant case, Petitioner did not set forth facts sufficient to establish *any* cause of action. As such, the case was properly dismissed.

D. Petitioner Wrongfully Asserts that She was Denied Due Process of Law and Constitutional Access to the Courts.

As her final argument, Petitioner claims that she was denied due process of law and deprived of her constitutional right to access to the courts. *See* Petition for Writ of Certiorari at p. 11. Due process of law, however, only entitles a citizen to "notice and an opportunity to be heard." *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). Without deprivation of these rights, a party has been afforded due process. In the instant case, Petitioner pursued legal recourse against Respondents. When the outcome of Petitioner's legal suit in the District Court was not to her liking, Petitioner exercised her right to appeal. Thus, her due process rights were satisfied. Simply stated, **due process entitles a person to a fair proceeding, not a favorable outcome.**

Moreover, the trial court made every effort to provide Petitioner with the opportunity to assert her legal claims against Respondents. The trial court denied jurisdiction over Petitioner's state law claims, dismissing these claims *without prejudice*. *See* Final Order of Dismissal attached to Petition for Writ of Certiorari as Appendix "B." Accordingly, Petitioner was free to bring suit in state court. As such, it is preposterous to assert that there has been a denial of due process. Indeed, by filing this Petition, Petitioner continues to exercise her due process rights. However, Petitioner refuses to recognize that due process does not ensure a favorable outcome. Essentially, Petitioner is utilizing

the very emotional argument of violation of due process rights to camouflage her true petition: a petition for review of the facts, yet again.

CONCLUSION

The Petition for Writ of Certiorari before this Court should be rejected as Petitioner fails to set forth any grounds to justify review by this Court. Further, Petitioner fails to establish or even assert any legal grounds for reversal of the Eleventh Circuit.

Respectfully submitted,

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